2001

State of Utah v. Joseph Morgan : Brief of Appellant

Utah Supreme Court

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STATE OF UTAH

STATE OF UTAH,
Plaintiff-Appellant,
-vs-
JOSEPH MORGAN,
Defendant-Respondent.

Case No. 13451

BRIEF OF APPELLANT

APPEAL FROM THE ORDER RESENTENCING RESPONDENT IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE STEWART M. HANSON, JUDGE, PRESIDING.

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IN THE

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The State of Utah, appellant, appeals the resentencing of respondent, Joseph Morgan, by the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Judge, presiding.

DISPOSITION IN THE LOWER COURT

Joseph Morgan was resentenced on August 3, 1973, to the crime of simple possession of a controlled substance with a term of six months in the Salt Lake County Jail by the Honorable Stewart M. Hanson, Judge.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the resentencing of respondent by Judge Hanson and an affirmation of the conviction and sentencing by Judge Sawaya for the crime of unlawful possession of a controlled substance with intent to distribute for value.

STATEMENT OF FACTS

This appeal is pursuant to the provisions of Utah Code Ann. § 77-39-4(3) which provides the state with a right of appeal "from an order made after judgment affecting the substantial rights of the state." The respondent was convicted in the Third Judicial District Court, Salt Lake County, State of Utah by the Honorable James S. Sawaya of being an aider and abettor of the crime of unlawful possession of a controlled substance with intent to distribute for value. Respondent was tried without a jury before Judge Sawaya. This conviction was entered on November 30, 1972, and on December 12, 1972, respondent was sentenced by Judge Sawaya to the Utah State Prison for the indeterminate term provided by law.

Subsequent to Mr. Morgan's trial, Mrs. Morgan (the perpetrator) was charged and tried for the same offense, possession of a controlled substance with intent to distribute for value. This was a jury trial presided over by the Honorable Ernest F. Baldwin, Jr. Mrs. Morgan was found guilty by the jury of the lesser offense of mere possession rather than possession with intent to distribute for value.

Following Mrs. Morgan's conviction, the respondent filed a petition for a writ of habeas corpus in the Third Judicial District Court which was assigned to Judge Stewart Hanson. The petition alleged that since Mrs. Morgan, the perpetrator of the crime, had been subsequently convicted of a lesser offense it was improper for Mr. Morgan, the aider and abettor of the crime, to have been convicted of a greater offense. Judge Hanson although refusing to grant the writ of habeas corpus heard testimony and then on his own motion decided to remand the matter to Judge Sawaya for resentencing. Judge Sawaya refused to reconsider the matter, feeling he was correct in his original decision. On the same day counsel for both the state and Mr. Morgan returned to Judge Hanson who stated that in his opinion Judge Sawaya should have resentenced respondent to a lesser charge and Judge Hanson proceeded to resentence the defendant to a six month term in the Salt Lake County Jail for the lesser crime of simple possession of a controlled substance. On September 12, 1973, this court upheld the original conviction of respondent by Judge Sawaya on the ground that there was sufficient evidence to convict Mr. Morgan of possession of a controlled substance with intent to distribute for value, but by that time the defendant had been resentenced and released by Judge Hanson.

ARGUMENT

POINT I

WHERE THE AIDER AND ABET-

TOR OF A CRIME WAS TRIED, CONVICTED AND SENTENCED PRIOR TO THE SEPARATE TRIAL OF THE PRINCIPAL OF THE CRIME, IT WAS LEGALLY POSSIBLE AND PROPER FOR THE AIDER AND ABETTOR TO BE CONVICTED OF A GREATER OFFENSE THAN THE PRINCIPAL.

Utah Code Ann. § 76-1-44 (1953) provides:

> "All persons concerned in the commission of a crime, either felony or misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission . . . are principals in any crime so committed.'

Thus, in Utah there is not the traditional common law distinction between principals of the first degree and aiders and abettors or accessories before the fact, etc.

The authorities are abundantly clear that there need not be an actual conviction of a principal to a crime in order for another person to also be found guilty of that same crime on the theory that he aided and abetted. It is, of course, true that there must be proof that a crime was committed, and that there was another person involved in committing that crime, but this proof can be made at the aider and abettor's trial by any probative, admissible evidence. It is not limited to proof that someone else has actually been convicted of the criminal of-

fense itself. This principle was succinctly stated in the case of *Britto v. People,* 497 P.2d 325 (Colo. 1972). In that case the defendant had been convicted of vehicular assault although he was sitting in the back seat of the automobile at the time. The Colorado Supreme Court reversed the conviction because there had been no showing of intent as the statute required, but in doing so, because of its particular applicability to the facts of the case, stated a proposition which they considered to be "elementary."

> "To successfully convict a defendant of being an accessory there must be sufficient evidence presented to show that there was, in fact, a principal who was guilty of the crime charged. (Citation omitted.) It is inconsequential whether or not the principal was ever charged with a criminal offense. (Citation omitted.)" 497 P.2d 326.

In the case of *State v. Spillman,* 468 P.2d 376 (Ariz. 1970), the Arizona Supreme Court considered a conviction for the crime of rape which was based, in part, on a theory of aiding and abetting another in committing a forceable rape. The Arizona statute concerning aiding and abetting, A.R.S. § 13-139 is practically identical to our section 76-1-44. The Court held as follows:

> "What is required *at the trial of the aider and abettor* is proof, complete and convincing, of the guilt of the principal. Justice demands

> that the principal crime be fully proved, since the guilt of the aider and abettor depends upon the commission of the principal crime. Thus, whether or not the principal is convicted or acquitted in a separate trial can have no bearing on the trial of the aider and abettor, if the evidence shows the latter guilty. . . . We hold that defendant's conviction under A.R.S. § 13-139 not made invalid by the fact that Gilbert Felix was later acquitted of rape." (Emphasis added). 468 P.2d at 378.

In *State v. Slater,* 476 P.2d 719 (Wash. 1970), a burglary conviction, which was based on aiding and abetting, was affirmed because properly admitted evidence indicated the presence of others at the scene. R.C.W. 9.01.030 of the Washington Criminal Code defines principal, almost identically to our Section 76-1-44, as including one who aids and abets. The Court held:

> "When the state relied on proof of aiding and abetting to sustain their charge against Slater as a principal, they were required to prove that a crime had actually been committed, as well as the fact that Slater aided and abetted in its commission. *Evidence which would be admissible against the principal if tried alone may be admitted in evidence on the trial of the aider and abettor in order to prove the principal crime was committed.* (Citation omitted.) The prosecution of the third person is not a prerequisite to the prosecution of the aider and abettor." (Emphasis added). 476 P.2d at 721.

For similar holdings see *Cody v. State,* 361 P.2d 307 (Okl.Cr. 1961); *People v. Simpson,* 152 P.2d 339 (Calif. 1944).

The case of *State v. Pacheco,* 27 Utah 2d 281, 495 P.2d 808 (1972) is consistent with these holdings. In that case a grand larceny conviction was reversed because the court found that an instruction on aiding and abetting was prejudicial inasmuch as "no one was proven guilty of larcency except the defendant, and since there was no evidence of any aiding and abetting. . . ." (*Id.*) there was no suggestion that a separate individual must first be convicted of the identical crime in a separate proceeding but only that in the defendant's trial itself there be proof that a crime was committed and that someone else was also involved.

A very closely analogous situation to that presented here is covered by Utah Code Ann. § 77-21-40 (1953) which provides:

> "An accessory may be prosecuted, tried, and punished, though the principal may be neither prosecuted nor tried, though the principal may have been acquitted."

As defined in Utah Code Ann. § 76-1-45 (1953), an "accessory" is meant to be an "accessory after the fact." As noted, "principal" includes aiders and abettors. Therefore, no similar statute is required for aiders and abettors. But clearly the policy of the State

is not to require the successful conviction of one criminal as a prerequisite to the conviction of another criminal.

In the present case, there was ample evidence under the above standards to find Mr. Morgan guilty of aiding and abetting in the commission of the crime of unlawful possession of a controlled substance with intent to distribute for value. This court, has, in fact, already ruled on this issue in that Mr. Morgan recently appealed his initial conviction to this court alleging there was insufficient evidence to sustain his conviction. This court specifically held there was sufficient evidence to uphold his conviction and affirmed Judge Sawaya's decision. *State v. Morgan,* .....Utah 2d....., ...P.2d....., Case Number 13218 (1974).

Thus, appellant submits that since this court has already held there was sufficient evidence at Mr. Morgan's trial to prove that a crime had been committed and that both Mr. Morgan and his wife assisted one another in the commission of that crime. The fact that in a subsequent trial before a separate judge Mr. Morgan's wife was convicted of only a lesser offense is immaterial. Mr. Morgan could have been so convicted even though his wife had never been convicted of anything as long as the evidence at his trial indicated his guilt.

POINT II

THE RESENTENCING COURT LACKED JURISDICTION TO RESENTENCE RESPONDENT.

While respondent's appeal was still pending before this court, he filed a petition for a writ of habeas corpus alleging a new ground not raised in his brief on appeal (that an aider and abettor of a crime cannot be convicted of a greater offense than that of his principal.) Judge Hanson refused to treat the matter as a habeas corpus proceeding, but heard evidence, and on his own motion ordered the trial court to resentence Mr. Morgan. When the trial judge refused, Judge Hanson resentenced Mr. Morgan to the lesser offense of possession of a controlled substance and ordered his release.

Appellant submits it was error for the resentencing judge to assume jurisdiction and resentence respondent while Mr. Morgan's appeal was still pending before the Utah Supreme Court. Such action amounts to a lower state court serving as an intermediate appellate court thereby depriving this court of its role to serve as reviewing tribunal of lower state court decisions as provided in Utah Code Ann. § 77-39-1 (1953).

Although Judge Hanson did not characterize his action as the granting of habeas corpus relief, that was the nature of Mr. Morgan's petition, and the results obtained by Mr. Morgan were virtually the same. Utah is replete with case law which precludes an individual whose appeal is still pending from petitioning a lower state court for habeas corpus relief thereby attempting to use habeas corpus as a substitute for appellate review. In *Johnson v. Turner,* 24 Utah 2d 439, 473 P.2d 901 (1968), this court held:

> "It makes veritable mockery of the rules of procedure to permit a person to ignore the time limitations for taking procedural steps and obtain an appellate review of a judgment at any time he takes a notion by a habeas corpus proceeding. The efficient and orderly administration of justice and respect for the finality of judgments regularly arrived at demand that the merry-go-round of litigation stop somewhere." *Id.* at 904.

Similarly, in *Sullivan v. Turner,* 22 Utah 2d 85, 448 P.2d 907 (1968), this court held:

> "When an accused is convicted of a crime, our law requires that any claimed error or defect be corrected by a regular appeal within the time allowed by law, and if this is not done the judgment becomes final. It can then be subjected to collateral attack by an extraordinary writ only when the interests of justice so demand because of some extraordinary circumstance or exigency: e.g., lack of jurisdiction, mistaken identity, where the requirements of law have been so ignored or distorted that the accused has been deprived of 'due process of law' . . . ." *Id.* at 87.908.

Thus, in habeas corpus matters this court has clearly held that it is improper for lower state courts to assume the role of reviewing court by granting habeas corpus relief where an appellate remedy before the Utah Supreme Court is or was available to the accused absent a showing of the extraordinary circumstances expressed

in *Sullivan, supra.* In the present case, Mr. Morgan could easily have obtained appellate review of the issue presented by Judge Hanson simply by filing an amended brief with the Utah Supreme Court since his appeal was still pending. Indeed, this was the only proper remedy available to respondent since reviewing jurisdiction rested with the Utah Supreme Court. Despite this available remedy, Judge Hanson took jurisdiction of the matter, acted as the reviewing court and resentenced and released the respondent. Although Judge Hanson chose to characterize his action as being something other than the granting of habeas corpus relief, the fact remains that he acted as the reviewing tribunal thereby depriving this Court of that function. Thus, the policy expressed in *Johnson v. Turner, supra,* and *Sullivan v. Turner, supra,* is equally applicable to the present situation.

Furthermore, appellant submits that the Utah Supreme Court obtained exclusive jurisdiction of the case or controversy pursuant to the filing and perfecting of the appeal, and until a decision on appeal was rendered, the appellate court maintained such exclusive jurisdiction to hear all orders, injunctions, amendments to appeal, or extraordinary writs. See 4A C.J.S. Appeal and Error, § 606-607, wherein this position was adopted. See also *Rodriquez v. Williston,* 104 Ariz. 280, 451 P.2d 609 (1969), wherein there was a showing that absent such a jurisdiction rule, it would be possible for the anomalous occurrence of a trial court granting a new trial on the same day the appellate court affirms the

judgment. Thus, the better rule of law is that the filing and perfecting of Mr. Morgan's appeal transferred all jurisdiction to the Utah Supreme Court during the pendency of such appeal and any motion, amendment or petition should have been addressed to that body by respondent.

Finally, even if the resentencing judge's characterization of his action as a resentencing is deemed appropriate, appellant submits that the judge lacked jurisdiction to order a fellow district court judge (who had served as trial judge) to resentence respondent. Appellant further submits that the trial judge's refusal to resentence respondent was proper and that Judge Hanson lacked jurisdiction to resentence respondent after Judge Sawaya's refusal. District court judges have have equal authority to serve as triers of fact at trial and are not bound by the opinions of fellow district court judges while acting in that capacity. The mere fact that another district court judge disagrees with the decision of the trial judge does not authorize him to usurp the trial judge's authority by rehearing the matter and ordering the trial judge to resentence the accused. Judge Sawaya would be required to resentence respondent only if a superior state court (the Utah Supreme Court) first determined that the initial decision was improper and ordered the trial court to reassume jurisdiction and resentence the accused. See *State v. Lee Lim,* 79 Utah 68, 7 P.2d 825 (1932) and *Folck v. Watson,* 102 Utah 470, 132 P.2d 130 (1942). Judge Sawaya properly re-

frained from resentencing respondent since an appeal of the conviction was still pending before this Court and no determination had yet been rendered by this Court as to the validity of Judge Sawaya's decision.

In summary, appellant submits it is the Utah Supreme Court which has the jurisdiction to order the trial court to resentence an accused, and it is the trial court which has the jurisdiction to perform the resentencing. Judge Hanson lacked jurisdiction to do either.

CONCLUSION

Appellant respectfully submits that this Court has previously ruled that there was sufficient evidence to support respondents' conviction and said conviction was proper. To sustain the lower resentencing court's ruling would establish an appellate procedure not forseen or authorized by the Utah Constitution or the Rules of Criminal Procedure governing the judiciary in the State of Utah. Based upon the case law and Utah statutes cited, the appellant submits that Joseph Morgan's resentencing should be set aside and the original sentence reinstated.

Respectfully submitted,

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